TIDALMARINE ENGINEERING SDN BHD v. CONLAY CONSTRUCTION SDN BHD & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[ORIGINATING SUMMONS NO: WA-24C-108-10-2016]
& WA-24C-113-10-2016]
26 MAY 2017

CONSTRUCTION LAW: *Adjudication – Setting aside – Application to set aside award of adjudicator – Dispute over payment claims – Whether there was breach of natural justice – Whether adjudicator failed to act impartially – Whether adjudicator had jurisdiction to make decision based on final claim or a final account claim – Whether there were grounds to set aside adjudication decision – Construction Industry Payment and Adjudication Act 2012, ss. 4, 5(2), 15, 25(a), 27(3) & 28(1)*

CONSTRUCTION LAW: *Adjudication – Enforcement – Application to enforce adjudication decision – Dispute over payment claims – Whether there was breach of natural justice – Whether adjudicator failed to act impartially – Whether adjudicator had jurisdiction to make decision based on final claim or a final account claim – Whether there were grounds to set aside adjudication decision – Construction Industry Payment and Adjudication Act 2012, ss. 4, 5(2), 15, 25(a), 27(3) & 28(1)*

Tidal Marine Engineering Sdn Bhd ('respondent') appointed Conlay Construction Sdn Bhd ('claimant') as its subcontractor to carry out some construction works for a project. The project was for the construction and completion of Institut Perguruan Guru Malaysia Kampus Bahasa Melayu which included the supply for all labour, material, machineries, tools, equipment and everything necessary for the execution and completion of the building works ('the works') for the contract sum of RM27,750,874.85. The claimant commenced and completed works under the said contract and the Certificate of Practical Completion ('CPC') was issued. The claimant served a payment claim on the respondent pursuant to the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') claiming a sum of RM5,290,664.21 for balance outstanding for works done. The claimant argued that its payment claim was premised upon Progress Payment Claim No. 30 for the sum of RM31,567,931 which was approved and agreed by the respondent's project manager and quantity surveyor. As the respondent had paid the sum of RM26,277,266.79, there was a balance outstanding of RM5,290,664.21 due and owing to the claimant. The respondent thereafter served a payment response on the claimant denying the sum claimed. The notice of adjudication was issued by the claimant and an adjudicator was duly appointed by the Kuala Lumpur Regional Centre for Arbitration ('KLCRA').

The claimant issued its adjudication claim and the respondent issued its adjudication response. Thereafter, the claimant issued its adjudication reply. The adjudicator *vide* her amended adjudication decision allowed the claimant's claim and ordered for, *inter alia*, the respondent to pay the claimant the sum of RM5,290,664.21 ('adjudicated amount'). The respondent *via* originating summons applied to set aside the adjudicator's decision. The claimant also applied *via* originating summons for enforcement of the adjudication decision. The issues that arose for determination were (i) whether there was a breach or denial of natural justice when the adjudicator did not allow the parties to file their written submissions and authorities; (ii) whether the adjudicator had failed to act independently or impartially and (iii) whether the adjudicator had jurisdiction to decide based on a final claim or a final account claim.

Held (dismissing respondent's originating summons for setting aside adjudication decision; allowing claimant's originating summons for enforcement):

(1) The adjudicator has very wide powers under s. 25(a) of the CIPAA to move the adjudication proceedings forward and to ultimately decide the dispute. It was entirely within the adjudicator's discretion whether to conduct or dispense with the filing of any submissions or authorities, thus there was no breach of natural justice on the part of the adjudicator in declining to allow the filing of written submissions and bundle of authorities as requested by the respondent. As the brunt of the respondent's complaint on the breach of natural justice was that of being deprived of the opportunity to submit on a jurisdictional ground, that could not be material as when confronted with such a challenge, the adjudicator, under s. 27(3) of the CIPAA, notwithstanding a jurisdictional challenge, may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under s. 15 or to oppose the application to enforce the adjudication decision under s. 28(1). (paras 23 & 39)

(2) In determining what was the amount outstanding as in whether there was accord and satisfaction in part of the payment claim and if so what was the original amount outstanding and hence what was the balance outstanding for which an adjudication decision should be confined to, this court was venturing into the merits of the payment claim. Such an exercise was set out to show the inherent infirmity of this ground of a lack of impartially or independence on the part of the adjudicator, venturing as it did into a consideration of the merits of the decision. The fact that the adjudicator did not agree with the respondent but accepted the claimant's position was no basis for alleging that the adjudicator had

not acted independently or impartially. It was a serious allegation levelled at a decision maker and in the absence of clear and cogent evidence, this ground of a lack of impartiality or independence should not ever be countenanced. This was clearly not a ground for setting aside the adjudication decision pursuant to s. 15 of the CIPAA. (paras 60-65)

(3) The CIPAA does not differentiate between a progress claim and a final progress claim or a final claim. So long as a payment claim comes within the definition of a 'payment' in s. 4 of the CIPAA as in 'a payment for work done or services rendered under the express terms of a construction contract' and further that the 'payment claim' can satisfy the requirements under s. 5(2) of the CIPAA, it would appear that it was a valid payment claim under the CIPAA. There is no express provision in the CIPAA to exclude a claim under a final progress claim or a final claim or for that matter a claim under a final account. Once a payment claim comes within the requirements of s. 5(2) of the CIPAA with respect to a construction contact, then the adjudicator would have the jurisdiction to adjudicate the dispute. An adjudicator is endowed with certain unusual and arguably extensive powers which one does not often see spelt out in other legislations (*ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd*). Looking at the wide ranging powers that an adjudicator has in his armoury of powers, there was nothing impeding him to decide on a payment claim premised on a final account. (paras 77, 80, 112 & 114)

Case(s) referred to:

ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Case [2015] 1 LNS 756 HC ***(refd)***

AM Associates (Singapore) Pte Ltd v. Laguna National Golf and Country Club Ltd [2009] SGHC 260 ***(refd)***

Balfour Beatty Construction Ltd v. Lambeth London Borough Council [2002] EWHC 597 (TCC) ***(refd)***

Carillion Construction Ltd v. Devonport Royal Dockyard [2005] EWHC 778 (TCC) ***(refd)***

GPS Contractors Ltd v. Ringway Infrastructure Services Ltd [2010] BLR 377 ***(refd)***

Kerpa Singh v. Bariam Singh [1965] 1 LNS 66 FC ***(refd)***

Lee Wee Lick Terence (alias Li Weili Terence) v. Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and Another Appeal [2013] 1 SLR 401 ***(refd)***

Mudajaya Corporation Berhad v. Leighton Contractors (Malaysia) Sdn Bhd [2015] MLJU 293 ***(refd)***

Tiong Seng Contractors Pte Ltd v. Chuan Lim Construction Pte Ltd [2007] 4 SLR 364 ***(refd)***

UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor and Another Case [2015] 5 CLJ 527 HC ***(refd)***

View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd [2017] 1 CLJ 677 CA ***(refd)***

Legislation referred to:
Construction Industry Payment and Adjudication Act 2012, ss. 4, 5(2), 8(3), 12(2)(c), 15, 25(a), (p), 27(3), 28(1)

Building and Construction Industry Security of Payment Act 2009 [Aug], s. 10(2)
Building and Construction Industry Security of Payment Act (Chapter 30B) [Sing], s. 2
Construction Contracts Act 2002 [NZ], s. 3

(Originating Summons No: WA-24C-108-10-2016)
For the plaintiff - K Gobinath; M/s Mohanadass Partnership
For the defendant - K Sarasvathi; M/s Dorairaj, Low & Teh

(Originating Summons No: WA-24C-113-10-2016)
For the plaintiff - K Sarasvathi; M/s Dorairaj, Low & Teh
For the defendant - K Gobinath; M/s Mohanadass Partnership

Reported by Suhainah Wahiduddin

JUDGMENT

Lee Swee Seng J:

[1] Tidal Marine Engineering Sdn Bhd ("Tidal") appointed Conlay Construction Sdn Bhd ("Conlay") as its sub-contractor to carry out some construction works for a project. The terms and conditions were contained in a letter of award dated 3 August 2010 ("the letter of award").

Project

[2] The project was for the Construction and Completion of Institut Perguruan Guru Malaysia Kampus Bahasa Melayu which includes the supply for all labour, material, machineries, tools, equipment and everything necessary for the execution and completion of the Building works ("the works") for the contract sum of RM27,750,874.85

[3] The essential terms and conditions of the letter of award are as follows:

(a) Conlay was obliged to commence the sub-contract works on 1 March 2010.

(b) The works shall be completed on 11 May 2011.

(c) The defect liability period shall be 12 months from the date of issuance of the certificate of practical completion.

(d) The final contract sum shall be based on the actual value of works certified by Tidal Marine and Kementerian Pelajaran Malaysia.

(e) Progress Payment is based on works progress at site as approved and certified by the Main Contractor's Project Manager.

[4] Conlay commenced and completed the works under the said contract and the Certificate of Practical Completion ("CPC") was issued on 18 April 2013.

[5] Pursuant to clause 17.2, Appendix 1 of the said contract, the defect liability period was to run for a period of twelve (12) months from the date of issuance of the CPC ie, 18 April 2013 until 17 April 2014.

Problem

[6] On 1 June 2013, Conlay submitted its Progress Payment Claim No. 30 for the sum of RM31,567,931 which was approved and agreed by Tidal's Project Manager and Quantity Surveyor.

[7] However, Tidal has thus far only paid the sum of RM26,277,266.79 leaving a balance outstanding of RM5,290,664.21 due and owing.

[8] Pursuant to a letter dated 8 April 2015, Tidal forwarded their updated Statement of Account and Final Certificate No. 29 which shows that the sum due to Conlay is only RM384,483.60. However, Conlay was not agreeable to this as Tidal's Project Manager and Quantity Surveyor have earlier confirmed and certified that the sum due to Conlay is as per the Conlay's Progress Claim No. 30.

Proceedings In The Adjudication

[9] Conlay as the claimant served a payment claim dated 3 February 2016 on Tidal as the respondent pursuant to the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"), claiming a sum of RM5,290,664.21 for balance outstanding for work done. The claimant argued that its payment claim is premised upon Progress Payment Claim No. 30 for the sum of RM31,567,931 which was approved and agreed by Tidal's Project Manager and Quantity Surveyor. As the respondent had paid the sum of RM26,277,266.79 there was a balance outstanding of RM5,290,664.21 due and owing to the claimant.

[10] The respondent thereafter served a payment response dated 19 February 2016 on the claimant denying the sum claimed. The notice of adjudication was issued by the claimant on 4 May 2016. An adjudicator was duly appointed by the Kuala Lumpur Regional Centre for Arbitration ("KLRCA") on 3 June 2016.

[11] The claimant issued its adjudication claim on 16 June 2016 and the respondent issued its adjudication response on 30 June 2016. Thereafter the claimant issued its adjudication reply on 11 July 2016.

[12] The adjudicator *vide* her amended adjudication decision dated 14 September 2016 allowed the claimant's claim as follows:

(a) That the respondent shall pay the claimant the sum of RM5,290,664.21 ("adjudicated amount");

(b) That the respondent shall pay the adjudicated amount within four weeks from the date of this decision in a form of secured financial instruments;

(c) That the respondent shall pay the claimant interest at the rate of 5% per annum on the adjudicated amount from 15 September 2016 until the actual realisation of the said payment by the claimant;

(d) That the respondent shall bear the full costs of the adjudication amounting to RM84,752.21 only comprising as follows:

(i) Adjudicator's fees of RM53,425.92;

(ii) KLRCA's administrative fees of RM10,685.18

(iii) GST on administrative fees of RM641.11; and

(iv) Costs of RM20,000.

Prayers

[13] The respondent applied in Originating Summons No: WA-24C-108-10-2016 to set aside the adjudicator's decision on the following grounds:

(a) There has been a denial or breach of natural justice;

(b) The adjudicator failed to act independently or impartially;

(c) The adjudicator has no jurisdiction to decide on the matter.

[14] There is also another application in Originating Summons No: WA-24C-113-10-2016 filed by the claimant for enforcement of the adjudication decision.

[15] Both applications were by consent heard together as one is the flip side of the other. To avoid confusion on the identities of the parties whether as plaintiff or as claimant, the court shall refer to the parties the way they were referred to in the adjudication as claimant and respondent respectively or sometimes as Conlay and Tidal respectively.

[16] If the court allows the setting aside of the adjudication decision, then the application to enforce would be dismissed. Conversely, if the court dismisses the setting aside application, then the application for enforcement of the adjudication decision would be allowed.

Principles

Whether There Was A Breach Or Denial Of Natural Justice When The Adjudicator Did Not Allow The Parties To File Their Written Submissions And Authorities

[17] The respondent submitted that they were denied the right to put in and file written submissions and bundle of authorities in regard to the issues raised by the parties in their respective adjudication claim, adjudication response and adjudication reply.

[18] The respondent on 4 August 2016 requested from the adjudicator to enable the parties to file their respective written submissions and bundle of authorities to explain the issues of fact and law.

[19] The adjudicator on 5 August 2016 rejected the respondent's request to file written submissions and bundle of authorities on the basis that the respondent should have included the said documents in the adjudication reply. Whilst it should have been the adjudication response and not reply, nothing turns on this.

[20] The respondent contended that the need to file in their written submission and authorities is critical as they were raising a jurisdictional challenge to the adjudicator having jurisdiction to hear the dispute.

[21] The respondent contended that it was a clear breach of natural justice for the adjudicator at one instance to have rejected their application to file in written submissions and bundle of authorities to support their contention and at the same time to have rejected the respondent's contention on the basis that there are no authorities produced by the respondent to support their contention.

[22] The respondent submitted that the least the adjudicator should have done is to direct the respondent to produce the authorities to support its contention on the jurisdictional challenge bearing in mind that the respondent's earlier application to file written submissions and bundle of authorities was rejected by the adjudicator.

[23] I agree with the claimant's counsel that there is no denial of natural justice in the manner described by the respondent as the adjudicator has very wide powers under s. 25(a) of CIPAA to move the adjudication proceedings forward and to ultimately decide the dispute. In particular, s. 25(a) provides, *inter alia*, that the adjudicator shall have the power to:

> establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties.

[24] In the case of *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Case* [2015] 1 LNS 756; [2015] MLJU 1951, the High Court held at p. 7 that:

> [41] ...The adjudicator is conferred discretion as to how the adjudication is to be conducted. To assist the adjudicator in carrying out that responsibility, the adjudicator is endowed with certain unusual and arguably extensive powers which one does not often see spelt out in other legislations. There is no equivalent provision in say the Arbitration Act 2005.
>
> ...

A

> [43] ... it is for the adjudicator to deal with how the adjudication proceedings are to proceed. This could include the calling of meetings and whether there will be hearings including oral hearings where witnesses may or may not be called ... In the matter of documents, **the adjudicator has the power to give directions on the discovery, submission and production of any documents** (emphasis added)

B

[25] The claimant submitted that since it is entirely within the adjudicator's discretion whether to conduct or dispense with the filing of any submissions or authorities, there is no breach of natural justice on the part of the adjudicator in declining to allow the filing of written submissions and bundle of authorities as requested by the respondent. Such a decision cuts evenly across both parties.

C

[26] An adjudicator after reading the payment claim and the payment response filed and the documents and explanations substantiating them in the adjudication claim, adjudication response and adjudication reply, may exercise his discretion to decide whether he would still need further clarification by way of written submissions on the law and the authorities.

D

[27] In fact, following the prescribed format of the adjudication response in Form 8 of the KLRCA Adjudication Rules & Procedure, there would have been sufficient information set out for the adjudicator to decide on the disputes as follows:

E

ADJUDICATION RESPONSE

A: Parties

1. [Describe the parties, if it differs from the Claimant's description]

F

B: The Construction Contract and/or Default Statutory Provisions

2. [Describe the Construction Contract, if it differs from the Claimant's description, e.g. the date of contract was made, the description of the work and project, the contract sum, the contract is oral or partly oral and partly in writing, etc.]

G

3. [Set out the any part of the default provisions in section 36 of the CIPA Act 2012, where relevant]

4. Relevant extracts of the contract are attached hereto as Schedule 1 [e.g. the relevant contractual provisions relating to the valuation and claimed amount (where the Respondent is an Unpaid Party), or to the set-off, abatement and/or cross-claim (where the Respondent is the Non-Paying Party)].

H

C: Background facts relating to the claim in dispute

5. [set out the relevant background facts relating to the dispute if they differ from the Claimant's view]

I

D: Relevant contractual provisions and/or statutory default provisions relating to dispute

6. The following are the relevant terms and conditions of the contract [and/or the relevant default provisions in section 36 of the CIPA Act 2012]:

[Set out the relevant contractual provisions relating to the valuation and claimed amount (where the Respondent is an Unpaid Party), or to the set-off, abatement and/ or cross-claim (where the Respondent is the Non-Paying Party) and/or statutory default provisions (if relevant)]

E: Payment Claim, Payment Response (if any) and Notice of Adjudication

7. [Identify and describe the Payment Claim, Payment Response (if any) and Notice of Adjudication, if they differ from the Claimant's view].

F: The nature and description of the dispute

8. [Set out the nature and description of the dispute, if it differs from the Claimant's view]

G: Respondent's answer to the Adjudication Claim

9. [Set out the grounds and basis thereof in response to the claim(s) made in the Adjudication Claim]

10. The Respondent relies on the following documents in support of its contentions [and/or claim]:

a) [set out all the relevant documents], a copy of which is attached hereto as Schedule 2;

b) [factual witness statement(s) of (Name(s) of the witness(es))], a copy of which is attached hereto as Schedule 3;

c) [expert witness statement(s) of (Name(s) of the witness(es))], a copy of which is attached hereto as Schedule 4.

[Set out the relief(s) or remedy(ies) on which the Respondent seeks a determination from the adjudicator, if any]

[28] Learned counsel for the claimant referred to the case of *GPS Contractors Ltd v. Ringway Infrastructure Services Ltd* [2010] BLR 377 which is illustrative of the broad discretionary powers of an adjudicator to order as well as limit the submissions filed. The adjudicator had at the outset directed a procedure by which there was to be a response and reply. The reply was to be restricted to any relevant matters raised by the respondent that are not addressed in the claimant's referral notice. The parties complied with the adjudicator's direction. However, after the claimant filed its reply, the respondent wrote to the adjudicator stating that it would be putting in a

A submission in a week, which was two days before the date for the adjudicator's decision. The adjudicator responded to the respondent's letter stating that he had made it clear that he had limited the submissions and that the respondent had assumed, wrongly, that it could make a submission in response to the reply. The respondent served a response to the reply
B nevertheless, but this was not considered by the adjudicator in his decision. The adjudicator issued an award in favour of the claimant. The claimant then applied for summary judgment based on the adjudicator's decision. One of the grounds raised by the respondent in resisting the enforcement application was that there had been a breach of the rules of natural justice on the part
C of the adjudicator in limiting the submissions. This argument was rejected by the court. Ramsey J said that the adjudicator was entitled to and needed to limit the number of rounds of submissions, and the wish of the respondent to serve a rejoinder two days before the date of the adjudicator's decision was something which the process had not, and could not, allow.

D **[29]** The claimant's learned counsel highlighted that though the adjudication reply was served by the claimant on 11 July 2016, the respondent had only on 4 August 2016 *via* email decided to suddenly write to the adjudicator to request for parties to put in written submission (See exh.t "A8" at p. 682 of the Tidal's affidavit in support).

E **[30]** Although the claimant did not object to the same, the claimant was however, of the opinion that there is no necessity for parties to put in written submission unless the adjudicator required parties to do so.

[31] The adjudicator also highlighted in her adjudication decision that adjudication is meant to be a mechanism for speedy dispute resolution, hence
F all timelines must be observed to enable the adjudicator to deliver the decision in a timely manner within the time-frame stated in the Act.

[32] Further the respondent did not give any reasons for failing to put in their submission if needed in the response stage or why they needed to do
G so at such a late stage of the proceedings ie, only three weeks plus after the adjudication reply was served did the respondent request to put in submissions. This was very late in the proceedings, knowing very well that the adjudicator had a strict timeline to meet in delivering her decision after the service of the reply.

H **[33]** The adjudicator had indicated that any submissions should have been raised by the respondent in its adjudication response.

[34] In any event, it is evident from the adjudication decision that the adjudicator has considered all issues and the contemporaneous documents in arriving at her decision. It might be opportune to observe here that there is
I a need to restrain from converting the adjudication proceedings into a full-blown litigation proceedings in a court.

[35] The intention of Parliament was to make the procedure and proceedings in adjudication as simple as possible and to ensure that it, being a speedy mechanism to dissolve disputes that has only the effect of temporary finality, does not become unduly convoluted and cumbersome. This can be seen in the fact that under s. 8(3) CIPAA a party to the adjudication proceedings may represent himself or be represented by any representative appointed by the party.

[36] One must bear in mind that it is not every breach of natural justice that would result in the setting aside of the adjudication decision.

[37] The respondent bears the burden of showing that the alleged breach of natural justice was material in order for the court to exercise its discretion to set aside the adjudication decision. As was aptly observed in the case of *ACFM (supra)* where the High Court held at pp. 9-10 that:

> [53] ... It is not simply any breach or denial which will forestall the enforceability of the adjudication decision or be a ground for setting aside that decision. The breach must be "either **decisive or of considerable potential importance to the outcome and not peripheral or irrelevant"; it must be material.** ... (emphasis added)

[38] Such was the view expressed in the case of *View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd* [2015] MLJU 695 at p. 10, para. 94.

[39] As the brunt of the respondent's complaint on the breach of natural justice was that of being deprived of the opportunity to submit on a jurisdictional ground, that cannot be material as when confronted with such a challenge, the adjudicator under s. 27(3) CIPAA, notwithstanding a jurisdictional challenge, may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under s. 15 or to oppose the application to enforce the adjudication decision under sub-s. 28(1).

[40] Simply put, it means this: irrespective of how elaborate and exhaustive the explanation may be on the jurisdictional challenge raised, the adjudicator need not be embroiled in it and is entitled to proceed to hear the parties on merits and deliver his decision accordingly.

[41] That elaborate and exhaustive submission may now be canvassed at the setting aside stage under a s. 15 CIPAA application, as it now is being canvassed before me and on which I shall shortly deal with in this judgment.

[42] There is thus no basis for arguing that there was a breach of natural justice merely because the adjudicator had not allowed the parties to file their written submissions on the issues raised and in particular, on the jurisdictional challenge taken.

A **Whether The Adjudicator Had Failed To Act Independently Or Impartially**

[43] The respondent contended that the adjudicator failed to act independently or impartially in that she failed to give any consideration to the position put forward by the respondent.

B **[44]** The respondent contended that there was an accord and satisfaction on the part of the claimant when the claimant agreed with the respondent's proposal to set off the respondent's fixed deposit against the agreed sum of RM2,496,532.05.

[45] The respondent's position is that both parties agreed that the total C amount outstanding to be paid to the claimant is RM2,496,532.05. This was proposed by the respondent to the claimant *via* its email dated 17 June 2014. It was contended that this proposal was duly accepted by the claimant through its letter dated 18 June 2014.

[46] Pursuant to this agreement, a total sum of RM2,111,748.45 was paid D to the claimant (by way of set-off with the respondent's fixed deposit) leaving the balance sum of RM384,783.60. Thereafter the respondent paid a sum of RM100,000 to the claimant reducing the balance outstanding to RM284,783.60.

E **[47]** The respondent submitted that the adjudicator erred in failing to consider that the conduct of the claimant in utilising the respondent's fixed deposit as proposed by the respondent in their email dated 17 June 2014 amounted to an act of accord and satisfaction on the part of the claimant and acceptance by the claimant of the terms stated in the respondent's email dated 17 June 2014.

F **[48]** Learned counsel for the respondent further stated that in the event the claimant was not agreeable to the terms stated in the respondent's email dated 17 June 2014, the claimant should not have utilised the respondent's fixed deposit to reduce the agreed outstanding sum as proposed by the respondent in its email dated 17 June 2014. In the Federal Court decision in *Kerpa Singh* G *v. Bariam Singh* [1965] 1 LNS 66; [1966] 1 MLJ 38, the Federal Court took into account the conduct of the appellant in accepting the payment from the respondent in deciding that there was an accord and satisfaction.

[49] Learned counsel for the respondent also stated that the adjudicator had H acted partially when the adjudicator accepted the claimant's reliance on the alleged final agreed statement of account. This document clearly shows that the amounts stated in the said document are subject to measurement. There was no agreement reached on the final amount.

[50] The respondent argued that, in any event, the adjudicator had failed I to consider that the alleged agreed statement of account was superseded by the parties' subsequent agreement in which the claimant accepted the respondent's terms as stated in the email dated 17 June 2014 by utilising the fixed deposit sum.

[51] It was also argued that the adjudicator failed to take into account the last payment of RM100,000 made by the respondent to the claimant. As such, the respondent contended that the adjudicator had failed to act independently and/or impartially.

[52] The claimant's position is that they did not at any point agree that the total outstanding amount to be paid by the respondent is RM2,496,532.05.

[53] The respondent's email dated 17 June 2014 merely shows that they were agreeable to allow the claimant to utilise Tidal's fixed deposit of RM6,100,000 for the claimant to secure an overdraft facility with AmBank. The said amount of RM6,100,000 was to be used to set off part of the sums that are due and owing by Tidal to Conlay under two projects namely KHEDN Project and IPGM Project. KHEDN Project is another project involving the same parties whereas IPGM Project is the project that is involved in this matter (See pp. 418-427 of exh. "A4" of the Tidal's affidavit in support).

[54] According to the claimant, from the amount of RM6,100,000, it was agreed that a sum of RM2,038,637.45 shall be utilised to set-off against the amounts that is due and owing from the respondent to the claimant under the said contract. The claimant at all material times did not agree that the final sums due under the said contract is RM2,496,532.05. This can be clearly seen in the claimant's letter dated 12 June 2014 which was referred to in the respondent's email dated 17 June 2014 (See p. 659 ie, exh. "A6" of the Tidal's affidavit in support).

[55] In fact, the respondent in their email dated 17 June 2014 had stated that the sum of RM2,496,532.05 is subject to "final discussion". Hence, there was no agreement that the outstanding sum is RM2,496,532.05 as the respondent itself had not finalised the outstanding amount. The only agreement reached *inter alia* was that the sum of RM2,038,637.45 from the fixed deposit will be used as part payment to set off the amounts due and owing to the claimant under this contract. This agreement was confirmed by the claimant in its letter dated 18 June 2014 which can be found at pp. 421-422 of exh. "A4" of the Tidal's affidavit in support.

[56] The claimant confirmed that a sum of RM100,000 was paid to them on 15 January 2016. However, the balance sum due from the respondent after taking into account the set off of RM2,038,637.45 and RM100,000 is RM5,290,644.21 and not RM384,783.60.

[57] It is evident from the adjudication decision (at pp. 660-681 of the Tidal's affidavit in support) that the adjudicator did take into consideration all facts and evidence produced in arriving at her decision.

[58] The claimant submitted that from the reading of the emails and relevant letters, it is evident that the parties had only agreed on the fixed deposit sum which will be used to set off part of the outstanding amount.

[59] The respondent further alleged that all amounts are subject to measurement. The claimant submitted that all measurement of works were carried out by the respondent's own quantity surveyor and was confirmed and agreed by the project manager which clearly shows that the claimant did carry out the works wherein the outstanding sum is now RM5,290,644.21. The quantity surveyor would not have agreed or confirmed the documents attached to the claimant's progress claim No. 30 without carrying out valuation or measurement to ascertain the works done (see the "final summary" which shows details of the claimant's claim at pp. 658 of exh. "A6" of the Tidal's affidavit in support).

[60] In setting out the opposite and opposing arguments of both the claimant and the respondent, one cannot help but conclude that we are venturing into the merits of the payment claim in determining what was the amount outstanding as in whether there was accord and satisfaction in part of the payment claim and if so what was the original amount outstanding and hence what is the balance outstanding for which an adjudication decision should be confined to.

[61] Such an exercise was set out to show the inherent infirmity of this ground of a lack of impartially or independence on the part of the adjudicator, venturing as it does into a consideration of the merits of the decision. This is not a case where the decision has been arrived at when there is no evidence to support it altogether. In the Singapore case of *AM Associates (Singapore) Pte Ltd v. Laguna National Golf and Country Club Ltd* [2009] SGHC 260 Judith Prakash J (now JA) held as follows:

> 25. ... However dissatisfied Laguna may be with the decision, it cannot ask for the Adjudication Determination to be set aside because it considers the decision to be against the weight of the evidence.

[62] The salutary speech of Humphrey Lloyd J in *Balfour Beatty Construction Ltd v. Lambeth London Borough Council* [2002] EWHC 597 (TCC) at pp. 22 and 23 is worthy of repetition as follows:

> [29] Nevertheless, in my judgment, that which is applicable in arbitration is basically applicable to adjudication but, in determining whether a party has been treated fairly or **in determining whether an adjudicator has acted impartially**, it is very necessary to bear in mind that the point or issue which is brought to the attention of the parties must be one which is either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant. It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself considerable weight and impact that in practice goes beyond the legal requirement that the decision has for the time being to be observed. *Lack of impartiality or of fairness in adjudication must be considered in that light. It has become all the more necessary that, within the rough nature of the process, decisions*

> *are still made in a basically fair manner so that the system itself continues to enjoy the confidence it now has apparently earned. The provisional nature of the decision also justifies ignoring non-material breaches. Such errors, if apparent (as they usually are), will be rectified in any negotiation and settlement based upon the decision.* The consequence of material issues and points is that the dispute referred to adjudication will not have been resolved satisfactorily by any fundamental standard and the chances of it providing the basis for a settlement are much less and the chances of it proceeding to arbitration or litigation are much greater. However the time limits, the nature of the process and the ultimately non-binding nature of the decision, all mean that the standard required in practice is not that which is expected of an arbitrator. Adjudication is closer to arbitration than an expert determination but it is not the same. (emphasis added)

[63] The fact that the adjudicator did not agree with the respondent but accepted the claimant's position is no basis for alleging that the adjudicator had not acted independently or impartially. It is in actual fact a back door method to attack the adjudication decision on its merits.

[64] Likewise the Court of Appeal in *View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd* [2017] 1 CLJ 677; [2015] MLJU 695 referred to the guidelines of the English Court of Appeal case in *Carillion Construction Ltd v. Devonport Royal Dockyard* [2005] EWHC 778 (TCC), which would be helpful to hearings under a s. 15 application under CIPAA as follows:

> … The English Court of Appeal had asserted: (a) the unsuccessful party must pay the adjudication award and if he is not happy, must challenge it through arbitration proceedings; (b) challenges based on excess of jurisdiction and/or breach of natural justice (save in the plainest cases) ought not be entertained or words to that effect …
>
> 85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision …

[65] It is a serious allegation levelled at a decision maker and in the absence of clear and cogent evidence, this ground of a lack of impartiality or independence should not ever be countenanced. This is clearly not a ground for setting aside the adjudication decision pursuant to s. 15 of CIPAA. I have no hesitation in dismissing this ground of setting aside the adjudication decision.

Whether The Adjudicator Has Jurisdiction To Decide Based On A Final Claim Or A Final Account Claim

[66] The respondent had raised a preliminary objection as to the claimant's entitlement to commence adjudication proceedings against the respondent pursuant to CIPAA.

[67] The respondent submitted that the claimant is not entitled to bring its claim to the adjudication as the claimant's claim is premised on a disputed statement of final account.

[68] The respondent had prepared a final account to settle the entire dispute and difference between the parties pursuant to the agreement reached between the parties subsequent to the alleged agreed statement of final account. It was argued that as the claimant is no longer at the site and no works are being carried out by the claimant, CIPAA has no application to the claimant's claim.

[69] However the adjudicator was of the view that she has the jurisdiction to hear the adjudication claim commenced by the claimant.

[70] The respondent contended that the adjudicator had failed to consider that CIPAA was meant to be for temporary relief during the progress of the works. According to learned counsel for the respondent, CIPAA was not created to have final disposal of the disputes between the parties. The final disposal of the dispute between the parties is to be decided in an arbitration or in court.

[71] Learned counsel for the respondent argued that when the alleged final account has been issued which is done after the works are completed, CIPAA should not apply. The respondent stated that CIPAA which provides temporary relief should be limited to instances that arose during the currency of the contract and not when dealing with final account matters as is in this instant case.

[72] The claimant's claim is based on the difference between the alleged final statement of account sum against the amount which they have received as payment. Learned counsel for the respondent said that to allow CIPAA to apply to dispute in relation to the final account will deprive the respondent of its rights to exercise set off. This would be unfair and prejudicial to the respondent.

[73] The respondent further contended that the intention of Parliament was very clear that CIPAA was designed to assist the cash flow of sub-contractors in order to facilitate the smooth completion of the project.

[74] It was also stated that in Malaysia, CIPAA does not provide that final account matters can be dealt by the Adjudicator. In the Court of Appeal decision in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2017] 1 CLJ 677; [2016] 6 MLJ 717 it was held that CIPAA does not apply to final account matters between the parties. However, learned counsel for the respondent conceded that this statement was a mere *obiter dictum* as the payment claim there was based on interim certificates.

[75] With respect to final progress claims, the current jurisprudence is that there is no good reason why a final progress claim is not adjudicatable. In *UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor and Another Case* [2015] 5 CLJ 527; [2015] 11 MLJ 499 it was held that CIPAA 2012 applies to interim and final progress claims as in an "adjudication is a mechanism to speedily settle payment disputes which in reality are disputes over interim and final progress claims."

[76] It may fairly be said that CIPAA does not differentiate between a progress claim and a final progress claim or a final claim.

[77] So long as a payment claim comes within the definition of a "payment" in s. 4 CIPAA as in "a payment for work done or services rendered under the express terms of a construction contract" and further that the "payment claim" can satisfy the requirements under s. 5(2) CIPAA, it would appear that it is a valid payment claim under CIPAA. To be clear, there is no express provision in CIPAA to exclude a claim under a final progress claim or a final claim or for that matter a claim under a final account.

[78] Section 5(2) CIPAA provides as follows:

> (2) The payment claim shall be in writing and shall include:
>
> (a) The amount claimed and due date for payment of the amount claimed;
>
> (b) Details to identify the cause of action including the provision in the construction contract to which the payment relates;
>
> (c) Description of the work or services to which the payment relates; and
>
> (d) A statement that it is made under this Act."

[79] Payment based on a final account claim is only an extension of a payment based on a final progress claim or certificate and it is still nevertheless coming within the meaning of a "payment claim" that would fulfil all the requirements of s. 5(2) CIPAA.

[80] Once a payment claim comes within the requirements of s. 5(2) CIPAA with respect to a construction contract, then the adjudicator would have the jurisdiction to adjudicate the dispute. A claim premised on a statement of final accounts issued by the superintending officer though disputed by the respondent as a non-paying party would be within the jurisdiction of the adjudicator to decide based as it is on the meaning of a "payment claim" being a claim for work done or services rendered under the express terms of a construction contract and further capable of fulfilling the requirements of s. 5(2) CIPAA.

[81] Where the words, given its ordinary and natural meaning are clear, there is no need to fall back on the purpose of the statute. It is only when the words are unclear that one must consider the purpose of the statute and to pursue an interpretation that would best serve the purpose of the statute. If authority is needed for such a proposition, one may refer to the case of *Mudajaya Corporation Berhad v. Leighton Contractors (M) Sdn Bhd* [2015] 5 CLJ 848; [2015] MLJU 293 where Mary Lim Thiam Suan J (now JCA) expressed as follows at p. 855 (CLJ); p. 3:

[18] I start with two basic principles of statutory interpretation. These principles are relevant and applicable whether interpreting substantive or subsidiary legislation; ...

[19] The first principle is that the legislation must be read as a whole; any specific provision must be read with or against the rest of the Act or in the case of any Orders issued, such Orders must be read against the substantive or parent Act ...

[20] The second principle of statutory interpretation is that **legislation must be construed according to its plain meaning and understanding**. However, when that plain meaning is in doubt, a purposive approach must be explored. A reading which would advance the intent and purpose for which the legislation was enacted in the first place ought to be adopted; provided of course such an approach does not strain or do violence to the language used in the legislation. This principle is encapsulated in section 17A of the Interpretation Acts of 1948 and 1967 [Act 388]. For guidance on this principle, I need to go no further than to cite the Federal Court's decision in *Andrew Lee Siew Ling v. United Overseas Bank (M) Sdn Bhd* [2013] 1 MLJ 449. At page 458, the Federal Court said:

> On the proper application of the provisions of the s. 17A of the Interpretation Act we would refer to the case of *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 6 MLJ 97 wherein this court had laid down the principles, *inter alia*, as follows:
>
> > In summarising the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed) says at p 566:
> >
> > (1) Legislation is always to be understood first in accordance with its plain meaning.
> >
> > (2) Where the plain meaning is in doubt the courts will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.
> >
> > (3) Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.
> >
> > (4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.
> >
> > (5) Where the courts conclude that the underlying purpose of the legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to

> the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislation the task of extending or modifying the legislation.
>
> *The choice prescribed in s. 17A of a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose of object' can only arise when the meaning of a statutory provision is not plain and is ambiguous.* If therefore, the language of a provision is plain and unambiguous s 17A will have no application as the question of another meaning will not arise. Thus, it is only when a provision is capable of bearing two or more meanings can s17A be resorted to in order to determine the one that will promote the purpose or object of the provision, such an exercise must be undertaken without doing any violence to the plain meaning of the provision ... (emphasis added)

[82] Assuming for a moment that the meaning of a "payment claim" is such that it is doubtful whether a claim based on final account is within the scope of CIPAA, then one may be permitted to look at the purpose of CIPAA to clarify to doubt and to bring certainty to the position of a payment claim made under a statement of final account.

[83] The long title to the Act encapsulated its purpose as follows:

> An Act to **facilitate regular and timely payment,** to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for **the recovery of payment in the construction industry** and to provide for connected and incidental matters. (emphasis added)

[84] I do not accept that the final account is not related to a regular or timely payment and that it does not fall within the purview of CIPAA 2012. It is only too obvious that a progression in a continuum of claim would end with a final claim either under a final progress claim or certificate or ultimately ending with a claim on a final account. A final payment is equally applicable to a final progress claim as well as a final claim under a statement of final account.

[85] Learned counsel for the respondent drew a distinction between a final progress claim and a final account claim. It was submitted that in the context of a final progress claim and the timeline when a final progress claim is issued, there will be further works to be complied with namely defects and rectification works. As such, the contractor would obviously need cash to carry out the said defects and rectification works. On the other hand, final account will only be issued at the conclusion of the project, after the defects and rectification of works are completed.

[86] It was further submitted that there would not be any further work required for the contract/project to be carried out after the issuance of the final account. Therefore, when a final account is issued, there will not exist a situation where the sub-contractor requires cash in order to continue with works pertaining to the contract/project. However to say that is to forget for a moment that the contractor as the unpaid party is still out of pocket for having done the work, he has still not been paid by the employer, now under the final account.

[87] However, the purpose of CIPAA is much broader than the respondent's perceived purpose in facilitating regular and timely payment for construction works but rather for the construction industry as a whole.

[88] The Act is concerned with the construction industry as a whole and not just claims as arising out of construction works done for a construction project which the respondent now says is not affected as the works have been completed. The fear, it was said, was that if the progress claims are not paid regularly and timely, then the progress in the works would be affected and the project abandoned altogether.

[89] However while the fear may be more real and present in an uncompleted work or project, it would be an artfully artificial distinction if one were to take the view that as the works or project has been completed, the protection of recovery of payment is no longer present.

[90] There is no good reason for us to tell a contractor that as he has been more resourceful in sourcing for funding perhaps even at a high interest rate to complete the project and that he has been more persevering in completing the works and in patiently waiting for the last payment to come with the finalisation of final accounts, he has no protection under CIPAA. Neither is it realistic to expect a contractor to have only one project at a time and that should he be successful in completing one project, he will just have to patiently wait for the payments due under the final accounts for that claim is not one that is amenable to the speedy resolution of dispute under CIPAA.

[91] We would then be punishing and depriving the more resourceful and resolute contractors and protecting the employers who have a penchant for either delaying in issuing the final accounts or disputing what is approved by its own architect or engineer in the final accounts.

[92] There is equally the danger of giving a carte blanche to unscrupulous employers to delay as long as possible for adjudication is now not available to the contractor and the contractor would have to take the longer and more expensive route and recourse of arbitration or litigation.

[93] That would be a most unhappy state of affairs for by and large, the final accounts would in all probability be approved by the superintending officer be he the architect or the engineer and the contractor might even have accepted the sum stated in the final account with the employer still not able to agree. To suggest that the contractor is deprived of the speedy mode of resolving the dispute *via* adjudication would be to miss the purpose of CIPAA altogether.

[94] Just because CIPAA provides temporary relief, it should not be limited to disputes on instances that arise during the currency of the contract and not when dealing with final account matters as is in this instant case.

[95] The claimant's claim in this case is based on a final account basis and it is premised on the difference between the total value of work done as against the amount which they have received as payment.

[96] The final account was allegedly prepared and consented to by both parties and the adjudicator treated this dispute as a final account dispute. I cannot understand how to allow CIPAA to apply at this stage would deprive the respondent of its rights to exercise its set off. The respondent as the non-paying party and employer can always raise the defence of set-off whether it be because of rectification costs incurred or because of a claim under liquidated and ascertained damages ("LAD") raised as a set-off. Indeed, there is no defence that may be raised in disputing a payment claim in the nature of a progress claim which could not be raised in disputing a payment claim based on a final account.

[97] In Singapore in the case of *Tiong Seng Contractors Pte Ltd v. Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364, where the issue to be decided on was whether the term "progress payment" includes "final progress payment", the High Court held as follows at pp. 5-6:

> [27] Looking at the structure and wording of the provision, it appears that an exclusion of "final payment" from the ambit of the Act can only be justified by express wording to that effect. It would not suffice to infer a legislative intention to exclude simply on the basis that "final payments" were not included in a non-exhaustive supplementary definition, ostensibly provided for clarification. **If the Legislature had intended to exclude final claims from the adjudicatory ambit of the Act, it could have clearly included a proviso or provision to that effect**. In the absence of such express exclusion, the primary broad-ranging definition in the main limb must be determinative.
>
> [28] In addition, a plain reading of "a payment that is based on an event or a date" or a "single or one-off payment" clearly encompasses final payments. Such a conclusion is vindicated by the fact that *the* **Act at no time makes any distinction between "final claims" and "non-final claims"**. Implying such a distinction from the supplementary limb would

A severely impair the protection afforded by the Act, as it would create a carte blanche for a contractor to renege on the final stages of payment, which would have an *equally deleterious effect on cash flow affecting other ongoing construction projects.*

...

B [33] From the above extract, it appears that the Act is primarily directed at safeguarding the continued financial viability of contractors who are victims of payment delays or disputes made in bad faith perpetuated by upstream contracting parties. From this perspective, *it makes no sense to draw an artificial distinction between allegedly "final" and "non final" payments, as the withholding of either would create the exact same downstream ripple effect intended* C *to be "deterred and weeded out" by the Act.* (emphasis added)

[98] The rationale for allowing a claim under a final payment claim would be equally applicable under a claim based on a final account, for such a claim is still a claim for work done or service rendered under the express terms of D a construction contract.

[99] The Singapore Court of Appeal in *Lee Wee Lick Terence (alias Li Weili Terence) v. Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and Another Appeal* [2013] 1 SLR 401 in affirming that their Security of Payment Act applied to a final claim held as follows at p. 438:

E 95 The other point to note in this case is that PC6 was a final claim for payment and not a progress payment. The Act is expressed to apply to progress payments (s. 5). The expressions "progress payment" is defined in s. 2 as follows:

...

F Even though no argument has been made to us on whether a final payment is a progress payment as defined, it seems to us that the definition is wide enough to include a final payment as it is payment, *albeit* final, to which a person is entitled for the carrying out of construction works (see also *Tiong Seng Contractors (Pte) Ltd v. Chuan Lim Construction Pte* G *Ltd* [2007] 4 SLR (R) 364 at [27].

[100] Under the Singapore Building and Construction Industry Security of Payment Act (Chapter 30B) a "progress claim" under its s. 2 means a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract, and includes:

H (a) a single or one-off payment; or

(b) a payment that is based on an event or a date;

[101] Reference may be made to the Parliament of Singapore debates recorded in Hansard in respect of the Building and Construction Industry I Security of Payment Bill where the Minister of State for National

Development's speech at the Second Reading of the Bill stated generally that the intention of Parliament to introduce the Act was to "preserve the rights to payment for work done and goods supplied of all the parties in the construction industry. It also facilitates cash flow by establishing a fast and low costs adjudication system. .."

[102] There is nothing in our Hansard to suggest that CIPAA is not applicable to final account claims.

[103] In New South Wales, the Hansard extract in respect of the Second Reading of Building and Construction Industry Security of Payment Amendment Bill, it was stated at p. 4 as follows:

> Minor changes have been made to remove possible ambiguities, for example, to ensure that progress payments include milestone payments, that progress claims under the Act can be made under construction contracts that have no provision for progress payments, and **that progress claims can include the final amount claimed and retention moneys …** (emphasis added)

[104] In the Australian Capital Territory, s. 10(2) of their Building and Construction Industry (Security of Payment) Act 2009 provides as follows:

> A progress payment may include:
>
> (a) the **final payment** for construction work carried out, or for related goods and services supplied, under a construction contract; or … (emphasis added)

[105] Under the Building and Construction Industry Security of Payment Act 2002 of Victoria, "progress payment" has been defined to include final payment as well.

[106] The position is the same in both South Australia and Tasmania wherein progress payment has been defined to include final payment as well.

[107] In New Zealand, s. 3 of the Construction Contracts Act 2002 sets out the purpose of their Act as follows:

> 3 Purpose
>
> The purpose of this Act is to reform the law relating to construction contracts and, in particular:
>
> (a) To facilitate regular and timely payments between the parties to a construction contract; and
>
> (b) To provide for the speedy resolution of disputes arising under a construction contract; and
>
> (c) To provide remedies for the recovery for payments under a construction contract

[108] As for "progress payment" under this Act in New Zealand, it is defined to include "any final payment under the contract".

[109] The purpose of our CIPAA can be said to be even broader than that of New Zealand as where the providing of remedies for the recovery of payments is concerned it is "under a construction contract" whereas ours is "in the construction industry."

[110] As for the definition of a "payment" and hence a "payment claim" it is broad enough to cover a final claim or a final account claim as it is generally defined to mean "a payment for work done or services rendered under the express terms of a construction contract" with no restriction on whether it is a final claim or a final account claim.

[111] If the argument raised against adjudicating a claim is based on the final account being tedious and time-consuming then the adjudicator can either resign or alternatively ask for the parties to grant him extension of time to deliver the adjudication decision under s. 12(2)(c) as well as exercising his concomitant powers under s. 25(p) CIPAA to extend any time limit imposed on the parties under the Act as may be reasonably required. The panoply of powers at his discretion and disposal are designed to arm him with the necessary array of ammunition to undertake even a convoluted case in a construction dispute so long as it is a dispute involving a payment claim. By reading his vast powers in s. 25 CIPAA, one gets the impression that not all cases of payment claims before him with the varied defences that may be filed in disputing such a claim would be a walk in the park. There will be the difficult cases involving even disputes on final accounts that would require him to deploy some of the powers at his disposal to decide fairly even though his decision has only interim finality. His powers in s. 25 CIPAA are reproduced below:

> 25. Powers of the Adjudicator
>
> The adjudicator shall have the powers to:
>
> (a) Establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties;
>
> (b) *Order the discovery and production of documents;*
>
> (c) Set deadlines for the production of documents;
>
> (d) *Draw on his own knowledge and expertise;*
>
> (e) *Appoint independent experts to inquire and report on specific matters with the consent of the parties;*
>
> (f) Call for meetings with the parties;
>
> (g) Conduct any hearing and limiting the hearing time;
>
> (h) *Carry out inspection of the site, work, material or goods relating to the dispute including opening up any work done;*
>
> (i) *Inquisitorially take the initiative to ascertain the facts and the law required for the decision;*

(j) Issue any direction as may be necessary or expedient;

(k) Order interrogatories to be answered;

(l) Order that any evidence be given on oath;

(m) *Review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute;*

(n) *Decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter.*

(o) Award financing costs and interest; and

(p) Extend any time limit imposed on the parties under this Act as reasonably required. (emphasis added)

[112] Even an arbitrator is not arrayed with such an armoury of powers at his disposal. An adjudicator is "endowed with certain unusual and arguably extensive powers which one does not often see spelt out in other legislations", as was observed by Justice Mary Lim J (now JCA) in *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd* [2015] 1 LNS 756; [2015] MLJU 1951 at para [41]. Even an arbitrator would be envious of such powers as "there is no equivalent provision in say the Arbitration Act 2005," as Her Ladyship further noted.

[113] I cannot see how allowing for a payment claim based on the statement of final account issued by the superintending officer in charged may be said to be defeating the purpose of the Act.

[114] In fact looking at the wide ranging powers that an adjudicator has in his armoury of powers, there is nothing impeding him to decide on a payment claim premised on a final account.

Pronouncement

[115] Therefore, I would dismiss the respondent's originating summons for setting aside the adjudication decision and correspondingly allow the claimant's originating summons for enforcement.

[116] As both applications were heard together, I had allowed one single costs of RM10,000 to be paid by the respondent in the adjudication to the claimant.